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IN THE

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1978

No. 78-5937

VENTURA E. YBARRA,
*Appellant,*

PEOPLE OF THE STATE OF ILLINOIS,
*Appellee.*

ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

# BRIEF OF THE STATE PUBLIC DEFENDER OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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# *BRIEF OF THE STATE PUBLIC DEFENDER OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF APPELLANT*

## INTEREST OF AMICUS CURIAE AND CONSENT

The State Public Defender of California is an agency of California state government which is charged with the representation on appeal of indigent criminal defendants. The outcome of the instant case will have substantial impact upon the rights of many persons being represented by this office, as well as upon the public as a whole, to be free from unreasonable searches and seizures of their persons. Accordingly, the State Public Defender of California is filing this brief amicus curiae in support of the appellant herein.

This brief is filed pursuant to Rule 42 of the Rules of the Supreme Court of the United States. Consent to the

filing of the brief has been given by the Office of the State Appellate Defender of Illinois and by the office of the Attorney General of the State of Illinois, counsel for appellant and appellee, respectively. Letters reflecting such consent have been forwarded to the Clerk of this Court under separate cover, and should be on file in his office.



## ARGUMENT

### I

### THE ILLINOIS STATUTE UNDER REVIEW, AS IT HAS BEEN CONSTRUED BY THE ILLINOIS COURTS, OPERATES TO CONVERT EVERY SEARCH WARRANT INTO A GENERAL WARRANT WHICH AUTHORIZES ARBITRARY SEARCH OF PERSONS WITHOUT REASONABLE CAUSE, THEREBY DIRECTLY CONTRAVENING THE FOURTH AMENDMENT

*Introduction*

On March 2, 1976, an Illinois magistrate was presented with an application for a search warrant which averred that a number of tinfoil packets containing heroin had been seen by a reliable informer upon the person of one "Greg", the bartender at a tavern known as the Aurora Tap. The application further alleged that "Greg" had announced he would have some heroin for sale on Monday, March 1, 1976.

The Magistrate accordingly issued a warrant commanding any peace officer to search ". . . the following person or place: 79 S. LaSalle, Aurora, Illinois, which is called the Aurora Tap Tavern . . .

. . . also, the person of "Greg", the bartender . . ." The object of the search was the recovery of evidence of possession of heroin as well as instrumentalities used in its sale.

The application for the warrant did not set forth any ground for belief that evidence of the offense would be found upon the person of appellant Ybarra or any of the tavern's customers; authority to search customers was

neither requested nor granted.

An Illinois statute, however, purports to grant authority to search the persons of individuals found in premises described in a warrant, regardless of the circumstances:

> "[I]n the execution of the warrant the person executing the same may be reasonably detain to search any person in the place at the time (a) to protect himself from attack; or, (b) to prevent the disposal or concealment of any instruments, articles, or things particularly described in the warrant" (Ill. Rev. Stat. (1975), Ch. 38 § 108–9).

Acting pursuant to the authority granted by the statute—not the warrant—appellant Ventura Ybarra, a patron, was subjected to a thorough search of his person *after* a cursory patdown for weapons had produced negative results. Thus, though there appears no evidence that Ybarra was either likely to attack the searching officers nor that he was attempting to conceal or dispose of evidence, the Illinois appellate court held the search of Ybarra to be authorized by the terms of the statute (*People v. Ybarra,* (Ill.App. 1978) 373 N.E.2d 1013).

By holding the search of Ybarra to be authorized by the statute, the state court has authoritatively construed that statute to vest absolute discretion in searching officers to search *any* person present in premises described in a warrant *regardless* of the circumstances. The state court has also held such practices to be sanctioned by the Fourth Amendment. (373 N.E.2d at 1017)



Perhaps an unspoken premise of the state court's opinion was that the search was somehow justified by its description of the tavern as a "dismal, drab and shabby type of establishment consisting of one room" (373 N.E.2d at 1014). The Fourth Amendment, however, does not make a distinction between "drab" taverns frequented by the poor and the most elegant restaurant or private club; moreover, it is highly dubious under the Fourteenth whether poverty can be implicitly equated with criminality.

If the Illinois court's view of the Fourth Amendment is upheld by this Court, then any man or woman who enters a public establishment, however humble or exclusive it may be, might find himself subjected to a full search of his person should the authorities have cause to suspect that the bartender was taking bets or that the headwaiter was peddling contraband.

Thus, the major vice of the Illinois court's opinion is that it construes the federal constitution without taking into account that a court engaging in constitutional construction must always "be alert to see that a doubtful precedent be not extended by mere analogy to a different case if the result will be to weaken or subvert . . . a principle of the fundamental law of the land" (*Dimick v. Schiedt,* (1935) 293 U.S. 474, 485).

The fundamental principle which is weakened and subverted by the inevitable application of the Illinois court's holding is, of course, the right of every person to be free from search and seizure unless there are reasonable grounds for suspecting him to be in

possession of evidence or instrumentalities of crime.

As this Court recently suggested in *Zurcher v. Stanford Daily* (1978), ___U.S. ___ [98 S.Ct. 1970], "[w]arrants shall describe with particularlity the individuals or places to be searched and shall be supported by one or more affidavits particularly setting forth the facts and circumstances tending to show that . . . the things [searched for] will be in possession of the individuals to be searched" [98 S.Ct. at 1978].

As the Court also recognized in the *Stanford Daily* case, *supra,* "[t]he struggle from which the Fourth Amendment emerged 'is largely a history of conflict between the Crown and the press' ", ___U.S. at___, [98 S.Ct. at 1981]. However, as *Dimick v. Schiedt, supra,* makes clear, a constitutional holding will have applicability to many fact situations unlike that of the case which led to its pronouncement. Thus, if the Illinois statute were sustained, there would be a grave danger that third-party searches without probable cause would be perpetrated against persons exercising rights expressly enumerated elsewhere in the Bill of Rights, as well as those simply enjoying food and drink in a public tavern.

For example, one very disturbing indication of the ease with which third-party searches can be converted into wholesale assaults upon constitutionally protected interests is seen in a recent raid upon the offices of a large and highly respected Los Angeles law firm by officers dispatched by the California Attorney General. Armed with an overbroad warrant, they reportedly



ransacked the firm's files, searched the purse of a female attorney, and attempted to cart off several boxes of client records before the search was halted by a temporary restraining order. See "Judge Assails Conduct In Search", The *Los Angeles Times,* April 13, 1979, Pt. II, p. 1.

In the following pages we shall discuss and summarize some of the historic abuses of individuals which provided the genesis of the Fourth Amendment, comparing them to the facts here. We shall then engage in a discussion of the reasoning advanced by this Court and by the many state courts which have dealt with searches of third parties who have been present under a variety of circumstances at a location being searched. Demonstrating a clear weight of authority against searches of persons who, as here, are merely found in places lawfully open to the public, we conclude that arbitrary searches authorized by the Illinois statute are prohibited by the Fourth Amendment.

*(A) The History of the Fourth Amendment is a History of Resistance to the Granting of Unbridled Discretion to Government Officers as to Whom and Where to Search.*

That the right of citizens to be free from arbitrary search and seizure is one of the most fundamental components of a free society is shown by its origin in the Magna Charta (N. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* (1937) 13–14 [hereinafter "Lasson"]; Schwartz, *The Great Rights of Mankind,* (1977)

[hereinafter "Schwartz"] 2–8).

Chapter 39 of the Magna Charta declares:

> "No freeman shall be taken or [and] imprisoned or disseised or outlawed or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by lawful judgment of his peers or [and] by the law of the land."

As is well documented by history, this provision was the result of the King's having arbitrarily imprisoned or seized the property of freemen who had merely displeased him (2 J. Lingard, *History of England* (London, 1849), 355–356; Lasson, *supra* at 20). Chapter 39 would be cited by Lord Coke and others centuries later as the basis of many of the liberties he sought to have recognized as the rights of Englishmen (Lasson, *supra*, at 21; *Schwartz, supra,* at 6–7).

Prior to the establishment of the American colonies, there were a series of confrontations centering about the king's use of arbitrary search and seizure as a means of enforcing laws against seditious literature.

The origin of the so-called general warrant can be traced to the sixteenth century, when Henry VIII created a licensing system for literature (F. Siebert, *Freedom of the Press in England*, 1476–1776 (1952) 48 [hereinafter "Siebert"]; Landynski, *Search and Seizure and the Supreme Court: A Study in Constitutional Interpretation,* (1966) 21 [hereinafter "Landynski"]. To enforce this scheme, the Court of the Star Chamber authorized the Stationers' Company, a private guild of printers, to appoint wardens who had authority to search all packs and trunks entering the country, and to



search at whim any warehouse, shop, or other place for evidence of contraband literature day or night (Landynski, *supra* at 21, 23; Lasson, *supra*, at 25, and sources there cited). The warrants executed by the stationers' wardens were "so general that they could be issued upon the merest rumor with no evidence to support them . . ." (Lasson, *supra*, at 26).

By the seventeenth century, the scope of arbitrary searches had extended far beyond the suppression of seditious literature. Under King James I, for example, the infamous writ of assistance was invented. Later codified under Charles II ([statute] 13 and 14 Car. II Ch. 2), the writ of assistance, which constituted *carte blanche* to officers to search anything at any time, was used to search for contraband which had been smuggled or upon which taxes and duties had not been paid (Lasson, *supra*, at 28). Today, much contemporary drug law enforcement is carried out through the tax and commerce powers (*See*, e.g. 21 U.S.C. § 960).

Resentment against the arbitrary means used to enforce the law began to grow, however. For example, after Charles II had issued new proclamations against sedition, and his Chief Justice (Scroggs) had issued general warrants to enforce them, Scroggs was subsequently impeached by Parliament. One of the articles of impeachment specified that Scroggs had issued "general warrants for attacking the persons and seizing the goods of his majesty's subjects *not named or described particularly in the said warrants*, by means thereof many . . . have been vexed, their houses

entered into and they themselves greviously oppressed . . ." (Lasson, *supra*, at 38 [emphasis added]). Also, following the revolution of 1688, King William abolished a tax scheme known as "hearth money" because its enforcement had resulted in too many arbitrary searches (*Ibid, citing* 1 Wm & M. Ch. 10).

Another significant event came in 1762 when Secretary of State Lord Halifax issued a general warrant to four officers directing them "to make strict and diligent search for the authors, printers and publishers of a seditious and treasonable paper, entitled, The North Briton, No. 45, . . . and them, or any of them, having found, to apprehend and seize, together with their papers" Lasson, *supra*, at 44). The messengers proceeded to arrest at least 49 persons in three days:

> "Armed with their roving commission, they set forth in search of unknown offenders, and unable to take evidence, listened to rumors, idle tales, and curious guesses. They held in their hands the liberty of every man whom they were pleased to suspect" (2 May, *Constitutional History of England,* 246–247).

In a subsequent suit for false imprisonment brought as a a result of these raids, Chief Justice Pratt held the warrants illegal, declaring, "To enter a man's house by virtue of a nameless warrant in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour" (*Huckle* v. *Money,* (1763) 2 Wils. K. B. 206, 95 Eng. Rep. 768).

In another, connected case, Pratt also remarked:



> "The defendants claimed a right under precedent to force persons' houses, break open escritoires, seize their papers, upon a general warrant, where no inventory is made of the things taken away, and *where no offenders' names are specified in the warrant,* and therefore a discretionary power given to messengers to search wherever their suspicions make chance to fall. If such power is truly invested in a secretary of state, and he can delegate this power, it certainly may affect the persons and property of every man in this kingdom, and is totally subversive of the liberty of the subject. If higher jurisdictions should declare my opinion erroneous, I submit as will become me, and kiss the rod; but I must say I shall always consider it as a rod of iron for the chastisement of the people of Great Britain" (*Wilkes* v. *Wood,* 19 How. St. Tr. 1153, 1167 (1763)). (Emphasis added).[1]

In 1765, Pratt, now elevated to the peerage as Lord Camden, heard the case of *Entick v. Carrington* (1765), 19 How. St.Tr. 1029. About the time of the Wilkes search, Lord Halifax had also issued a warrant to messengers to search for John Entick, the author of the *Monitor or British Freeholder,* and to seize him with his books and papers. The messengers liberally construed the warrant, ransacking Entick's home for four hours, and Entick brought suit. Lord Camden's landmark opinion

[1] Wilkes, it seemed, had refused to obey the warrant as his name was not on it, calling, "a ridiculous warrant against the whole English nation." He was carted off to Halifax's office in a chair while his home was ransacked. He was committed to the Tower of London after refusing to answer questions (See I. Brant, "The Bill of Rights; Its Origin and Meaning" (1965)).

condemned both the use of general warrants and the practice of searching "for evidence" with or without a warrant:

> "If this point should be decided in favor of the Government . . . the secret cabinets and bureaus of every subject in this kingdom would be thrown open to the search and inspection of a messenger, whenever the secretary of state shall see fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel . . . (*Ibid* at 1063)."

In response to these decisions[2] and to popular sentiment on the subject, the House of Commons resolved in 1766 that general warrants in libel cases were illegal. Spurred on by the eloquent debating of William Pitt, the House subsequently declared all general warrants to be invalid.[3]

The battle against arbitrary searches was far from over, however. Around 1760, in order to enforce laws restricting the importation of foreign molasses into the American colonies, the Crown began employing writs of assistance. These writs allowed customs officers to arbitrarily enter and search buildings for smuggled

[2] Also in 1765, Lord Mansfield of the Court of the King's Bench spoke out against general warrants, rejecting an appeal from the successful suit of one of the printers involved in the Wilkes search. Mansfield opined that despite the sanctions of the Secretary of State and the long authority of the Star chamber, such uncertain warrants were void. Other justices in the case agreed that "no degree of antiquity can give sanction to a usage bad in itself" (*Leach v. Money*, 19 How. St. Tr., 1002, 1027 (1765); Landynski, *supra* at p. 29).

[3] Lasson, p. 49; 16 Hansard's *Parliamentary History of England*, 207 ff.; Landynski, *supra*, p. 30.



goods (1 LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (1978), § 1.1, p. 4). These writs were even more ominous than the general warrants. General warrants were at least tied to a particular libelous incident and were therefore limited in time and object. Writs of assistance, on the other hand, gave absolute discretion to the official for the life of the sovereign under whom they were issued. The officer was empowered to search virtually at will (Lasson, *supra*, at p. 54; Landynski, *supra*, at p. 31).

Following on the heels of the 1760 order that trade laws be strictly enforced, George II died. All writs of assistance automatically expired six months later, in 1761. A group of Boston merchants then petitioned the court for a hearing on whether new writs would be issued (Landynski, *supra* at p. 33). Jeremiah Gridley, the Attorney General of Massachusetts Bay, argued on behalf of the customs officers that there was authority for issuance of writs in the colonies under statutes passed under Charles II and William III (Landynski, at 32). Gridley was audacious enough to add that the writs were beneficial as a "check on arbitrary authority since a sheriff was required to accompany customs officers on searches" (Landynski, at pp. 33–34).

James Otis, on behalf of the merchants, responded with a spectacular denunciation of England's colonial policy and of general warrants.[4] Otis saw the writs as

[4] See *Paxton's Case* (1761), in J. Quincy, Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, 1761–1772, p. 51 (1865) (hereinafter "Quincy").

"the worst instance of arbitrary power, the most destructive of English liberty, that ever was found in an English law book," insofar as they placed "the liberty of every man in the hands of every petty officer" (2 *The Life and Works of John Adams* (1856) 523; see also, T. Cooley, *A Treatise on Constitutional Limitations,* (8th Ed. 1927) pp. 301–303). Notwithstanding the appeal of Otis' presentation, however, the court, led by Justice Hutchinson, sustained the legality of the writs.

Despite the momentary setback posed by Hutchinson's decision, the momentum created by Otis' opposition to the writs grew. Otis himself was elected to the Massachusetts General Assembly where he continued to be an outspoken critic of the writs. During his term, the legislature passed a bill which attempted to abolish the general writ of assistance, although the governor struck it down as contrary to the law of William III (Lasson, at p. 66; Quincy, at p. 499). The Massachusetts Assembly also attempted to withhold Hutchinson's salary and Hutchinson suffered other reprisals during the course of the Revolution (Quincy, *supra,* at 416).

Later, in 1772, a Massachusetts committee of twenty-one wrote a tract entitled "Infringements and Violations of Rights" which, at the instance of James Otis, decried the general search powers of customs officers (Lasson at 72; *citing Sources and Documents Illustrating the American Revolution,* 1764–1788 (Oxford 1923) p. 74.) Also, Connecticut refused to honor royal writs of assistance on the grounds they were



"unconstitutional." Most colonial governments rarely or never issued general writs of assistance under their own authority (Lasson at pp. 75–76; Landynski, at pp. 36–37).

Other indications of the abiding determination of early Americans to curb the discretion of searching officers is found in the various states' Bills of Rights which were drafted during the Revolution. For example, Art. X of the Virginia Bill of Rights provided,

> "That general warrants whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, *or to seize any person or persons not named,* or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not be granted" (2 B. Poore, *Federal and State Constitutions* (Washington 1877) p. 1909). (Emphasis added.)

At least six other state declarations or bills of rights followed Virginia by including some provisions as to search and seizure (*Id;* Lasson, at pp. 81–82).

During the ensuing debate over ratification of the Constitution, omission of a bill of rights was perhaps the most frequently stated reservation, becoming a rallying cry of the anti-federalists (Lasson, at pp. 88–89). In the Virginia ratification convention, Patrick Henry pointed in particular to the potential excesses of sheriffs searching at the instance of distant officials:

> "When these harpies are aided by excisemen, who may search, at any time, your houses and most secret recesses, will the people bear it? If you think so, you differ from me. Where I thought there was a possibility of such mischiefs, I would grant power

with a niggardly hand; and here there is a strong possibility that these oppressions shall actually happen" (J. B. McMaster, *Pennsylvania and the Federal Constitution* (1888) 58).

In the same vein, Mason criticized the lack of any restraint on governmental overreaching in the original constitution:

". . . The officers of Congress may come upon you now, fortified with all the terrors of paramount federal authority. Excisemen may come in multitudes; for the limitation of their numbers no man knows. They may, unless the general government be restrained by a bill of rights, or some similar restriction, go into your cellars and rooms, and search, ransack, and measure everything you eat, drink, or wear. They ought to be restrained within proper bonds" (3 Elliott's Debates, *supra,* pp. 445–449).[5]

Conclusion to Part A

From the above synopsis of history, it can be seen that while of course many specific interests have been involved in the people's long resistance to arbitrary searches, the common thread underlying that resistance is the feeling that officers enforcing statutory law ought not be given unbridled authority to decide for themselves who or what to search in order to do so.

The Illinois statute under review here, when set in

[5] Though the Constitution was initially ratified without a bill of rights, recognition of popular sentiment impelled President Washington to refer to the need for amendments in his inaugural address (10 *Writings of George Washington* (W. C. Ford Ed. 1891) 385–386; *Inaugural Addresses of the Presidents* (1961) 3).



relief against the historical backdrop painted above, will easily be seen to be afflicted with the exact vice which has been the cause of the struggle which culminated in the Fourth Amendment.

B. *The Clear Weight of American Authority Holds Searches of Third Parties, Where There Is No Probable Cause With Respect to Them, Are Unlawful.*

1. *Decisions of This Court Have Consistently Emphasized the Requirement of Specificity in Search Warrants and the Objective of Having Judicial Officers Rather Than Police Officers Determine The Reasonableness of a Search*

This Court has long emphasized the requirement of specificity in search warrants so as to minimize the discretion of law enforcement officers in determining the scope and conduct of searches. In *Marron v. United States*, 275 U.S. 192, 196 (1927), Mr. Justice Butler, speaking for a unanimous Court, declared:

"The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."

In *Johnson v. United States*, 333 U.S. 10, 13–14 (1948), Mr. Justice Jackson provided the classic statement of the Fourth Amendment objective of limiting the discretion of the police in conducting searches:

"The point of the Fourth Amendment, which is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences

be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence, sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."

See also *Coolidge v. New Hampshire*, 403 U.S. 443, 449 (1971); *McDonald v. United States*, 335 U.S. 451, 455–456 (1948).

In *United States v. Di Re*, 332 U.S. 581 (1948), the government conceded the position advocated here by the State of Illinois and upheld by the Illinois appellate court. *Di Re* involved a prosecution for knowingly possessing counterfeit gasoline ration coupons. After being told by an informant that he would be purchasing ration coupons from one Buttita at a specified location, the police followed Buttita's car to the appointed place. Officers approached the car and found the informant in the back seat holding two counterfeit gasoline coupons in his hand. The informant told police that he had obtained the coupons from Buttita. Di Re, who was seated in the passenger side of the front seat, was arrested and searched. Counterfeit coupons were found on his person. Stressing the fact that the transfer of a ration coupon would not itself suggest illegality and also



that the transaction took place on a public street in daytime, this court held that there was no probable cause to search Di Re. Responding to the government's argument that search of a passenger in an automobile was justified as incident to the right to search the vehicle without warrant upon a showing of probable cause, the court stated:

"The government says it would not contend that, armed with a search warrant for a residence only, it could search all persons found in it. But an occupant of a house could be used to conceal this contraband of his person quite as readily as can an occupant of a car. Necessity, an argument advanced in support of this search, would seem as strong a reason for searching guests of a house for which a search warrant had issued as for search of guests in a car for which none had been issued. By a parity of reasoning with that on which the government disclaims the right to search occupants of a house, we suppose the government would not contend that if it had a valid search warrant for the car only it could search the occupants as an incident to its execution. How then could we say that the right to search a car without warrant confers greater latitude to search occupants than a search by warrant would permit?" [332 U.S. at 587]

The principle underlying *Di Re,* that mere presence at the scene of suspected criminal activity, without more, does not constitute probable cause to search, was reaffirmed in the arrest context in *Sibron v. New York,* 392 U.S. 40 (1968).

"The inference that people who talk to narcotic addicts are engaged in the criminal traffic—is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security" (392 U.S. at 62).

Finally, as the Court noted earlier this term, the Fourth and Fourteenth Amendments are indeed implicated in the search of persons abroad in public. These amendments require ". . . at a minimum, that the facts upon which the intrusion is based be capable of measurement against 'an objective standard' . . . [in order to assure that] the individual's expectation of privacy is not 'subject to the discretion of the official in the field' . . . (citations omitted).

". . .[P]eople are not shorn of all Fourth Amendment protection when they step out of their homes onto the public sidewalks.[6] Nor are they shorn of those interests when they step from the sidewalks into their automobiles" *Delaware v. Prouse* (1979), __U.S.__ [99 S. Ct. 1391, 1396–1397, 1401].

It should follow easily that neither are people shorn of Fourth Amendment protection when they step from their auto or a sidewalk into a public tavern.

[6] That the Illinois courts' interpretation of the Fourth Amendment results in violation of the precepts reiterated in *Prouse* is shown by the fact that Illinois cases have been relied on by the courts of Kansas to sanction the search of a person who was doing no more than standing on the public curb in front of a house for which officers had a warrant *(State v. McClelland* (1974), 215 Kan. 81, 523 P. 2d 357).



*2. The Concept That a Search Warrant for Premises Does Not Automatically Justify a Search of All Persons Present Was Well Established in American Law Even Before Application of the Fourth Amendment to the States.*

The government's concession in *United States v. Di Re, supra,* that police officers, armed with a search warrant for a residence only, could not search all persons found in it, is not surprising in light of other decisions to the same effect predating both *Di Re* and the incorporation of the Fourth Amendment into the Fourteenth in *Wolf v. Colorado* (1949), 338 U.S. 25 and *Mapp* v. *Ohio* (1961), 367 U.S. 643.

In *Purkey v. Mabey,* 33 Ida. 281, 193 p. 79 (1920), the Idaho Supreme Court considered a damage action for an assault alleged to have been committed on appellant by a sheriff acting under the authority of a search warrant. The warrant was issued to respondent sheriff to search one Bank Cigar Store for intoxicating liquors. Appellant was neither the owner nor an employee of the cigar store; rather, he was a mere bystander. While executing the search warrant, the sheriff proceeded to search the person of appellant. The trial court instructed the jury to return a verdict for respondent. In reversing the judgment and remanding the case for further proceedings, the Idaho Supreme Court stated:

"The right protected by the above provision of our Constitution has been deemed of so great importance that a similar provision is found in the Constitution of the United States and in the Constitution of nearly every state in the Union. Under such constitutional provisions, it is uniformly held that the search warrant must conform strictly to

> the constitutional and statutory provisions providing for its issuance. It must contain a description of the premises to be searched. No discretion must be left to the officer executing the warrant as to the premises which he is authorized to search."

The court held that a warrant issued for the search of a place where there was probable cause to believe that intoxicating liquors were dispensed in violation of law could not "be extended so as to constitute authority to search a person not connected in any way with the place being searched, who merely happens to be on the premises, and who is not mentioned or described in the affidavit of probable cause upon which the warrant was issued" (193 P. at 80).

The Supreme Court of Appeals of West Virginia reached the same result in *State v. Massie,* 95 W.Va. 233, 120 S.E. 514 (1923). Defendant was searched in a pool room under a "warrant for the pool room and everybody that was in it," and a pistol was found on his person. Convicted of carrying a pistol without a license, defendant contended that the search of his person was unconstitutional. The Supreme Court of Appeals agreed, holding:

> "It must be remembered that defendant had no interest in the poolroom; and that he was not named in the warrant. Assuming that the warrant was properly issued, and authorized the officer to search the premises described, did it authorize the search or arrest of one not named therein. who had no interest in or connection with the place or the business conducted there? . . . The constitutional provision above quoted [state constitutional provision identical



> with the Fourth Amendment] says that the warrant shall particularly describe the person or thing to be seized. The thing to be seized is described in the warrant here, but no person is named. To so construe the statute under consideration and the warrant issued thereunder as authorizing the officer to whom it is directed to search persons not named therein or to seize articles not directed to be taken, would be to give it the effect of the general search warrants in England and the writs of assistance in this country which were the subject of much discussion and general condemnation in the latter half of the eighteenth century. Indeed, it is said that the Fourth Amendment to the Federal Constitution was the direct result of the use of such warrants and writs (Cooley's Const. Limitations, (7th Ed.) 424–430; 2 Story on the Constitution (5th Ed.), § 1902; 2 Watson on the Constitution, 1414; 34 Harvard Law Rev. 362; *Boyd v. United States* 116 U.S. 610; *People v. Marxhausen,* 204 Mich. 559 171 N. W. 557, 3 A.L.R. 1505 (120 S.E. at 515 [7])."

Observing that "[it] is held everywhere that a search warrant must as particularly as possible describe the place to be searched, and that no other place can be searched under such warrant [citation omitted]," the court declared that "*[t]he person of a citizen is as sacred as his property" (Id.).* (Emphasis added).

In *State v. Wuest,* 308 N.W. 899, 900 (Wisc. 1926), the Wisconsin Supreme Court noted that "there seems to be no dissent in the authorities from the proposition that a

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[7] The Michigan court's 1919 decision in *Marxhausen* contains a useful discussion of the history of the Fourth Amendment somewhat along the lines of that set out in part (A), *ante.*

search warrant, issued for the search of a place, does not confer authority for the search of a person, even though he be in charge of the place authorized to be searched." [8]

Finally, in one nineteenth century decision, the Supreme Court of Michigan condemned the arbitrary seizure of property belonging to a third party who was not suspected of crime by saying that, "The exercise of power no less arbitrary than this has caused revolutions" (*Newberry v. Carpenter,* (1895) 107 Mich. 567, 65 N.W. 530.

[8] *Accord: State v. Grames,* 68 Me 418, 421 (1878) ("It is one thing to find liquors in a place, and a very different thing to find them upon a person. A place to be searched is not a person to be searched"); but *see: Olympia v. Culp* (1925), 136 Wash. 374, 377; 240 P. 360 "officers may, under a warrant to search the premises, lawfully search any one found therein whom they have reasonable cause to believe has the articles for for which the search is instituted upon his person."



*3. The Weight of Contemporary Authority Also Condemns the Arbitrary Search of Persons Merely Present in a Public Establishment*

A clear majority of jurisdictions which have considered the question of whether police officers may search any and all persons they may encounter on the premises while executing a search warrant have held such broad search powers unconstitutional.[9]

[9] *United States v. Branch* (D.C. Cir. 1976) 545 F.2d 177, 181; *United States v. Micheli* (1st Cir. 1973) 487 F.2d 429, 431; *United States v. Haywood* (E.D.La. 1968) 284 F.Supp. 245, 250; *United States v. Festa* (D. Mass 1969) 192 F.Supp. 160, 163; *Smith v. State* (1974) 292 Ala. 120, 289 So.2d 816, 817–818; *People v. Tenney* (1972) 25 Cal.App.3d 16, 21–23, 101 Cal.Rptr. 419, *overruled on other grounds in People v. Leib* (1976) 16 Cal. 3d 869, 129 Cal.Rptr. 433, 548 P.2d 1105; *People v. Lujan* (1971) 174 Colo. 554, 484 P.2d 1238, 1242; *State v. Procce* (1969) 5 Conn.Cir. 637, 260 A.2d 413, 417–418; *State v. Wise* (Del.Super.Ct. 1971) 284 A.2d 292, 294; *Wilson v. State* (1975) 136 Ga.App. 70, 221 S.E.2d 62, 63; *State v. Cochran* (1975) 135 Ga.App. 47, 217 S.E.2d 181, 183–184; *State v. Nabarro (1974) 55 Haw. 583, 589, 525 P.2d 573, 576–577; McAllister v. State* (1974) 159 Ind.App. 340, 306 N.E.2d 395, 397; *State v. Burns* (Me. 1973) 306 A.2d 8, 10; *Sibriski v. State* (1973) 19 Md.App. 149, 310 A.2d 200, 201; *Commonwealth v. Smith* (Mass 1976) 348 N.E.2d 101, 103–107, cert. den. 429 U.S. 944; *State v. Fox* (1969) 283 Minn. 176, 168 N.W.2d 260; *State v. Bradbury* (1968) 109 N.H. 105, 243 A.2d 302, 303; *State v. Sims* (1978) 75 N.J. 337, 382 A.2d 638, 642–646; *State v. Helton* (1975) 146 N.J. 98, 369 A.2d 10, 11–12, *aff'd* 72 N.J. 169, (1977); *State v. Riggins* (Law. Div. 1976) 138 N.J. Super. 497, 351 A.2d 406; *People v. Nieves* (1975) 36 N.Y.2d 396, 369 N.Y.S.2d 50, 330 N.E.2d 26, 30–34; *Commonwealth v. Platou* (1973) 455 Pa. 258, 312 A.2d 29, *cert. den.* 417 U.S. 976; *Commonwealth v. Reece* (1970) 437 Pa. 422, 263 A.2d 463; *State v. Carufel* (1970) 106 R.I. 739, 263 A.2d 586, 641; *City of Tacoma v. Mundell* (1972) 6 Wash.App. 673, 495 P.2d 682, 684; *Contra: e.g., United States v. Graves* (D.C. App. 1974) 315 A.2d 559, 560–561; *Samuel v. State* (Fla. 1969) 222 So.2d 3, 5; *State v. Loudermilk* (1972) 208 Kan. 893, 494 P.2d 1174, 1176, 1178; *Brown v. State* (Tex.Cr.App. 1973) 498 S.W.2d 343, 346.

"The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental' [Citation omitted]." (*Leland v. Oregon*, 343 U.S. 790, 798 (1952).[10]

Several state courts, particularly those of New York, New Jersey, and Massachusetts, have provided extensive discussions of the issue here under consideration.

In *People v. Nieves, supra,* 36 N.Y.2d 396, 369 N.Y.S.2d 50, 330 N.E.2d 26 (1975), the New York Court of Appeals had before it a state statute which provides: "A search warrant which directs a search of a designated or described place, premises or vehicle, may also direct a search of any person present thereat or therein." In upholding the statute, the court held that "[t]he circumstances under which a warrant may issue for the search of all occupants of a particular place are severely

[10] Commentators are also in agreement. See, e.g., Mascolo, *Specificity Requirements for Warrants under the Fourth Amendment: Defining the Zone of Privacy* (1968) 73 Dick.L.Rev. 1, 19–20; Comment, " *'The Search All Persons Power'—Does Presence Really Equal Probable Cause?'* (1973) 58 Cornell L.Rev. 614, 618–619. Discussing the Illinois statute here under consideration, Professor Wayne LaFave expresses serious doubts about its constitutionality in view of this court's decision in *United States v. Di Re;* LaFave, Search and Seizure: The Course of True Law . . . Has Not . . . Run Smooth" (1966), U.Ill.L.F. 255, 271–273. Professor LaFave suggests that a narrow reading of the statute to require some additional connection of the person to be searched to the premises beyond the mere status of guest may be necessary to render it constitutional. The court below, however, has refused to provide such a reading.



limited: the facts before the issuing judge at the time of the warrant application, and reasonable inferences from those facts, *must establish probable cause to believe that the premises are confined to ongoing illegal activity and that every person within the orbit of the search possesses 'the articles sought"* (330 N.E.2d at 34, emphasis added.)

The facts of the search conducted in *Nieves* present an even stronger case for upholding the police action than the facts of the case at bar. In *Nieves,* a New York police detective had obtained a search warrant to conduct a daytime search of one "El Parador Restaurant and Cocktail Lounge," the person of Elizar Vidal "and any other persons occupying said premises[,] and of any other person who may be found to have such property in his possession or under his control or to whom such property may have been delivered" for policy slips and various gambling paraphernalia (330 N.E.2d at 29). The warrant was based on a Detective Smith's affidavit that he had made over two hundred arrests for policy violations and that his application was based upon both personal knowledge and investigation and upon information supplied by a confidential reliable informant. Detective Smith stated that, while conducting a surveillance of the El Parador, he had observed various Puerto Rican male subjects approach Elizar Vidal, hold short conversations with him, and then pass money to him. Each subject left the area after giving slips of paper and money to Vidal, who, after each transaction, would enter the El Parador, stay inside a

short time, and then return to the outside of the restaurant. One of the subjects (not Nieves) was a known and convicted policy runner. While the surveillance was in progress, Detective Smith's informant walked into view and took a policy slip from his pants pocket. The informant approached Vidal, handed him the paper along with some money, and then left the area. Vidal went inside the restaurant, and Detective Smith left. Based on his observation and experiences, Smith concluded that Elizar Vidal was conducting a policy operation and was using the El Parador for keeping and storing policy records. Furthermore, the evidence sought was of a nature that could be easily and quickly destroyed (330 N.E.2d at 30).

Detective Smith testified at the suppression hearing that when he and other police officers were about to enter the El Parador to execute the search warrant, two men came out, apparently recognized the detective, dropped policy slips to the pavement and fled. The police then entered the El Parador, which was open, and saw Elizar Vidal seated at the bar next to another man (not Nieves). Nieves was seated alone at a table in the restaurant. Smith testified that these three were the only people present in the premises. There was no evidence that Nieves attempted to flee or resist or that the officer saw any policy slips or other evidence linking Nieves to the commission of a crime. The officer told all three men to empty their pockets. Policy contraband was recovered from Nieves' possession (*Id.*).

Nieves contended that the New York statute, as



written, was violative of the Fourth Amendment in that it authorized general searches. He also contended that the particular search of his person under the statute was unreasonable (*Id.* at 30). The court declined to strike down the statute but concluded that, as applied to Nieves, it commanded an improper general search.

In analyzing the issue of "whether mere presence at a specified place may be a sufficiently particular description of a person in a search warrant to meet the standards of the Fourth Amendment," the court stated that the sufficiency of the description in the case would "hinge in part on whether there was probable cause to believe that each and every occupant of the El Parador at any time of day possessed the policy slips and gambling records sought under the warrant [citation omitted].[11] The court concluded that the information before the issuing magistrate indicated, at best, probable cause to believe that Vidal, the named person in the warrant, might be engaged in a policy operation from the El Parador. There was, however, "no support for the inference that every occupant of the restaurant might be similarly engaged and hence in possession of the policy records sought in the warrant." 330 N.E.2d at 32–33. Neither the search warrant nor its supporting affidavit named the defendant or contained any physical description of him.

The court stated:

> "From the circumstances shown in the warrant application, it could as readily have been inferred that the unknown and unpredicted number of occupants at the El Parador might include innocent

> patrons having a meal or a drink, or service personnel delivering supplies for the daily operation of the restaurant and bar, all having no connection with the suspected criminal activity. Certainly there was no justification for an inference that each and every occupant in each and every area of the bar, the restaurant, the kitchen, the storage rooms and every other part of the premises was likely to possess policy records or be a party to illegal gambling in the premises. In short, there was not probable cause to believe that any person occupying the premises might be in possession of illegal gambling records at the time of the search. As a consequence, the description of defendant merely by reference to his presence at the premises was too general" (330 N.E.2d at 33).

By authorizing "a search of the entire premises at an apparently public place without any showing of probable cause that the premises were confined to illegal activity and that there was a substantial probability that all persons present at the time of execution would possess the items sought," the search warrant was too general as to the defendant, thereby affording no justification for the search (330 N.E.2d at 34).

The *Nieves* court noted that the public rather than private nature of the premises searched, while not determinative, was a significant factor to be considered in determining the reasonableness of the search (330 N.E.2d at 34). The court, expressing concern that innocent patrons of a public establishment would be swept up in dragnets, held that applications for search



warrants should state whether any person apparently unconnected with the illegal activity has been seen at the premises (*Id.*).

Finally, in upholding the New York statute, the court placed great importance in the role to be played by the issuing magistrate. The statute's potential problems of overbreadth and indefiniteness in authorizing the search of "any other person present" would be cured by limiting the discretion of the police:

> "An application for this type of warrant must be subjected to rigid scrutiny by the independent magistrate. . . The facts made known to the magistrate and the reasonable inferences to which they give rise, must create a substantial probability [citation omitted] that the authorized invasions of privacy will be justified by discovery of the items sought from all persons present when the warrant is executed. If this probability is not present, then each person subject to search must be identified in the warrant and supporting papers by name or sufficient personal description" (330 N.E.2d at 34).

Unlike the New York law, Illinois' broad search statute leaves to police on the scene virtually unlimited discretion as to which persons to search. No independent magistrate is obliged to subject to rigid scrutiny an application to search particular unidentified persons present as required by the New York law.

In *State v. Sims, Supra,* 75 N.J. 337, 382 A.2d 638 (1978), the New Jersey Supreme Court held that a warrant authorizing the search of service station premises and any person therein was an invalid general warrant

where the only evidence as to illegal gambling operations at the service station was a single intercepted telephone conversation during which two illegal bets were placed.

A unanimous court ruled that a search warrant providing for the search of unnamed persons which did not contain information sufficiently particular to distinguish its subject from the general public violates the Fourth Amendment. Following this court's reasoning in *United States v. Di Re,* the New Jersey court stated:

> "Defendants . . . were entering the office area of a service station. While such a place is admittedly not as open to general public invitation as, for instance, a restaurant or department store might be, mere presence at such premises is certainly less suggestive of participating in the owner's criminal activity than would be presence in an automobile" (382 A.2d at 644).

While the court did point to the fact that the search warrant affidavit contained no statement that numerous known gamblers had been observed entering the office over a period of time, it indicated in a footnote that even such an averment would not have supported the search in question.

The court noted:

> "However, even where there is police observation of known lawbreakers operating from a given location, a warrant permitting the search of all individuals therein is impermissible if that location is a truly public place . . . Although the service station in the instant case is not so likely to be frequented by



> members of the public as is a tavern, it surely possesses greater indicia of a public place than does a residential apartment" (382 A.2d at 645-646, n.3).

*Sims* cites with approval a New Jersey lower court decision, *State v. Riggins,* supra, 138 N.J.Super. 497, 351 A.2d 406 (Law Div. 1976), where a warrant authorizing the blanket search of anyone found in a tavern was declared void as a general warrant. The police in *Riggins* had obtained a warrant authorizing the search of a tavern and certain named persons, the bartender, barmaids and "all persons present" in the tavern to uncover evidence of an illegal lottery operation. While searching the tavern pursuant to the warrant, the police searched defendant who was in the tavern at the time of the raid. Defendant was not a tavern employee, nor was she mentioned by name or description in the search warrant affidavit. The search of defendant uncovered lottery paraphernalia, and she was arrested (351 A.2d at 407).

In granting defendant's motion to suppress evidence on the grounds that no probable cause existed to believe defendant was involved in criminal activity at the tavern, the court utilized the requirement of nexus between the individual to be searched and the ongoing criminal event. Such nexus was required to satisfy both the specificity requirement for warrants and to establish the requisite probable cause. The court commented:

> "In the present case the place to be searched was a public tavern, which caters to transient numbers of individuals from all segments of society. Taverns have traditionally served the societal interest in and

need for entertainment and community socializing. It is thus logical to assume that presence in a tavern would be for the legitimate purposes described. No rational suspicion leading to a probable cause belief that any person therein is involved in an illegitimate or criminal endeavor can be inferred from a patron's mere presence" (351 A2d at 408).

The court emphasized that the magistrate who authorized the "blanket search" was not presented with sufficient facts to equate one's mere presence at the tavern with criminal involvement:

> "The tavern, although arguably housing an illegal gambling operation, was also open to the public for legitimate purposes. Both patrons and alleged gamblers frequented the premises. It is quite possible that the illicit operations were covert in nature and went undetected by the tavern's various customers" (*Id*).

By authorizing the "blanket search of everyone present regardless of any prior determination of an individual's participation in the criminal activity," the warrant became a general warrant. "The evils of a general warrant could not be more pronounced" (351 A.2d at 409).

In *State v. Helton, supra,* 146 N.J.Super 98, 369 A.2d 10 (App.Div. 1975), *aff'd* 72 N.J. 169, a New Jersey court held that police officers who had a warrant authorizing a search of a tavern for narcotics and who observed the defendant making furtive movements with his hands in relation to his pockets did not have probable cause for his warrantless search.

The raiding party in *Helton* searched all ten persons



in the tavern. The officer testified that he ordered Helton to empty his pockets because, when approached, Helton appeared to be transferring objects from one pocket to another. The officer suspected an attempt to conceal narcotics. The search of Helton's person resulted in discovery of folded number slips. Noting that the police had no information whatsoever about Helton apart from his conduct as he was approached in the course of the search, the court held: "(1) there was no probable cause to believe defendant to be in possession of seizable objects on the occasion in question; (2) alternatively, if the circumstances were within the outer perimeter of probable cause, they were not strong enought to bypass the warrant requirement on any theory of threatened loss of evidence" (369 A.2d at 11–12). The New Jersey Supreme Court unanimously approved the decision of the Appellate Division "substantially for the reasons" expressed in the lower court's opinion (*State v. Helton, supra,* 72 N.J. 169, 369 A.2d 10 (Sup.Ct. 1977)).

The decisions of the New Jersey courts on this issue are particularly germane here in view of the Illinois Attorney General's reliance on Chief Justice Weintraub's opinion in *State v. De Simone,* 60 N.J. 319, 288 A.2d 849 (1972) (Appellee's Motion to Dismiss, p. 5). *De Simone* involved a warrant to search a specific automobile "and all persons found therein" for gambling paraphernalia. The automobile had been observed to be an instrument in a "floating lottery drop" operation. Defendant, a passenger in the automobile,

was searched; revealing lottery slips on his person.

*De Simone* is easily distinguishable on the grounds that the issuing magistrate in that case could have properly assumed that, from the very nature of the crime alleged and the instrumentalities involved, anyone present in the car was probably a party to the crime, and thus independently subject to arrest and incidental search. (cf. *United States v. Robinson* (1973) 414 U.S. 218.). This, of course, is exactly what the New Jersey court did when a search of patrons of a public establishment was attempted under color of *De Simone.*[11] (*State v. Sims, supra,* 75 N.J. 337, 382 A.2d 638.)

In *Commonwealth v. Smith, supra,* 348 N.E.2d 101 (Mass. 1976), the Supreme Court of Massachusetts upheld the search of all persons at an apartment pursuant to a search warrant. In so doing, however, the court made clear "that only in special circumstances such as those shown in the affidavit here will a search

[11] In *De Simone,* Chief Justice Weintraub supplied the following set of guidelines for determining what circumstance would furnish probable cause to believe that a person present at a particular location was a participant in the ongoing criminal activity:

> "On principle, the sufficiency of a warrant to search persons identified only by their presence at a specified place should depend upon the facts. A showing that lottery slips are sold in a department store or an industrial plant obviously would not justify a warrant to search every person on the premises, for there would be no probable cause to believe that everyone there was participating in the illegal operation. On the other hand, a showing that a dice game is operated in a manhole or in a barn should suffice, for the reason that the place is so limited and the illegal operation so overt that it is likely that everyone present is a party to the offense. Such a setting furnishes not only probable cause but also a designation of the persons to be searched which functionally is as precise as a dimensional portrait of them" (288 A.2d at 850).



warrant aimed principally at the premises also be held to include validly the search of any person present (348 N.E.2d at 103.) The court held that it was permissible to conclude from the particular facts of the case that "it was probable that any person in the apartment was a participant in the trafficking in heroin there" (348 N.E.2d at 106). Adopting the guidelines of the New York Court of Appeal in *Nieves, supra,* the court stressed (*inter alia*) as a particularly relevant factor in determining whether there is probable cause to believe that all persons present at the named premises are involved in the criminal activity afoot the "small, confined and private" nature of the premises "[a]s opposed to a public or quasi public place where casual presence of persons for a myriad of noncriminal reasons is to be expected" (348 N.E.2d at 107 and n.5).

Finally, the Illinois Appellate Court's opinion in the present case contains an erroneous interpretation of decisions of Georgia and Washington appellate courts. *Amicus* submits that, contrary to the Illinois Appellate Court's conclusion, the courts of both states have held that a specific warrant to search premises can *not* automatically be converted into a general one to search individuals (*State v. Cochran,* supra, 135 Ga. App 47, 217 S.E.2d 181, 183 (1975); *State v. Raum,* 172 Wash. 680, 21 P.2d 291 (1933); *City of Tacoma v. Mundell,* supra, 6 Wash.App. 673, 495 P.2d 682 (1972)).

The Illinois Appellate Court quotes with approval, 373 N.E.2d at 1015, the following language from the Supreme Court of Washington in *Olympia v. Culp,* 136

Wash. 374, 377, 240 P.360, 361–367 (1925):

> "Officers making a search of premises under a search warrant may lawfully detain all persons found therein until the search is concluded.
>
> Any other rule would frustrate the purposes of the search; the officers would be compelled to stand idly by while the articles for which the search was instituted were carried away. The law is not so impotent as this. The officers may, under a warrant to search the premises lawfully search any one found therein *whom they have reasonable cause to believe has the articles for which the search is instituted upon his person*" (emphasis added).[12]

Thus, in *City of Tacoma v. Mundell, supra,* 6 Wash.App.673, 495 P.2d 682, 685 (1972), the Washington Court of Appeal specifically held that "[a] specific warrant to search a premises cannot be converted into a general one to search individuals" (*see* also *State v. Raum,* supra, 172 Wash. 680, 21 P.2d 291 (1933)).

The Illinois opinion also cites *Willis v. State,* 122 Ga.App. 455, 177 S.E.2d 487 (1970) as agreeing with its position (373 N.E.2d at 1015). *Willis* involved a Georgia statute, Ga. Stat. Ann. Sec. 27-309, identical to the Illinois statute. The Illinois court notes in its opinion:

> "Defendant argues the Georgia courts do not allow the persons of those present to be searched, pursuant to a warrant for the premises, but that other facts and circumstances making it likely that the items are

[12] We believe that *Culp* is incorrect, however, to the extent it fails to insist that such probable cause be set out in the application for the warrant. Cf. *State v. Helton, supra,* 146 N.J. Super. 98, 369 A. 2d 10, *aff'd* 72 N.J. 169.



> being concealed by them must be present to justify the search of their persons . . . We find *Willis* is actually supportive of the search of the defendant therein" (*Id.*).

Despite this assertion, in *State v. Cochran, supra,* 135 Ga.App. 47, 217 S.E.2d 181, 183, the Georgia Court of Appeals interpreted *Willis* to hold "that a warrant to search designated premises will *not* authorize the search of every individual who happens to be on the premises" (emphasis added). In *Cochran* the court struck down the search of persons attempting to leave the Sunshine Club. The police stopped the car in which defendant was riding pursuant to a warrant authorizing the search for narcotics of automobiles, persons, and two buildings on the premises known as the Sunshine Club. Holding this to have been a general warrant, the court observed that the Sunshine Club was "a commercial establishment, not a private apartment" (217 S.E.2d at 183). Noting that the club was accessible to the entire public, the court stated that the "indiscriminate sweep of the language employed in this warrant is constitutionally intolerable" (217 S.E.2d at 184; see also *Wilson v. State, supra,* 136 Ga.App. 70, 221 S.E.2d 62, 63 (warrant purporting to authorize search of commercial bar "and all persons on the premises" held invalid general warrant as to customer seated at the bar when warrant executed)).

## CONCLUSION

Whether one approaches the facts of this case from the standpoint of pre-constitutional English history, state common law, or contemporary federal constitutional law, one is led to the same conclusion: The bounds of reasonableness, within which officers of the government of any free society must confine themselves, have been transgressed by the arbitrary search of Ventura Ybarra.

For this reason, the judgment of the Illinois appellate court should be reversed.

Respectfully submitted,
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